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JAMES H. McGINLEY

IN THE

Supreme Court of the United States

October Term, 1910.

Nos. 79 and 80.

MARIANO MARTINEZ, ADMINISTRATOR OF FRAN-
CISCO MARTINEZ, DECEASED, APPELLANT,

vs.

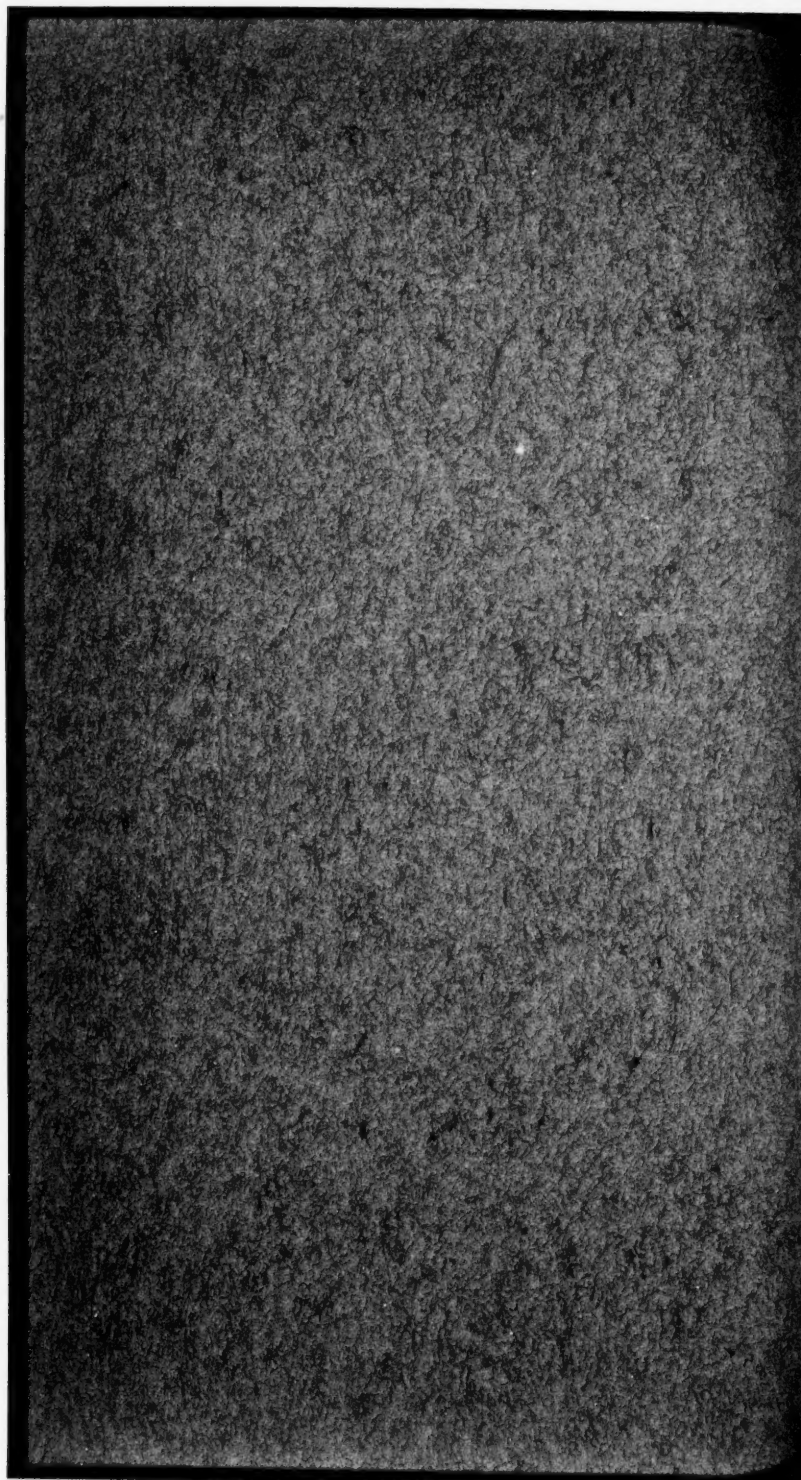
THE INTERNATIONAL BANKING CORPORATION
APPELLEE.

APPEALS FROM THE SUPREME COURT OF THE
PHILIPPINE ISLANDS.

BRIEF FOR APPELLEE.

HENRY B. DAVIS,

For the Appellee.



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I.

Statement of the Case.

In addition to what is set forth in the introductory statement and statement of facts in the brief for the appellant, the following details are deemed essential to a proper apprehension of the case, which is, in effect, two cases in one.

In No. 79 (No. 3471 in the court below) the appellee, plaintiff below (hereinafter called plaintiff), filed its complaint against the appellant's intestate, and one Cohn, his guardian, alleging as follows:

On May 2, 1903, the appellant's intestate (hereinafter called Martinez) and his son were the owners in equal shares of two steamers, namely, the "Don Francisco," and the "Germana." On that date plaintiff loaned Martinez Thirty Thousand Pesos, local currency, on condition that the same should be repaid on August 2, 1903, with interest at 8 per cent per annum. As security for such loan Martinez executed an instrument in writing wherein he mortgaged to plaintiff his interest in the two steamers. On June 9, 1903, Martinez and his son divided their ownership of the two steamers, so that Martinez became the sole owner of the "Germana," and the son sole owner of the "Don Francisco," and plaintiff released its mortgage as against the latter and acquired a lien upon the entire steamer "Germana" (Rec., p. 2).

No part of the loan or interest had been repaid; and on November 19, 1903, Cohn was appointed guardian for Martinez; and the plaintiff, therefore, prayed judgment for Thirty Thousand Pesos, local currency, or its equivalent in Philippine currency, with interest at 8 per cent from May 2, 1903, costs and expenses, and for a sale of the steamer "Germana" to pay the claim of the plaintiff (Rec., p. 3).

After the interposition and overruling of demurrers to the complaint (Rec., pp. 6-7), Martinez and his guardian answered, denying all the allegations of the complaint and alleging as follows:

On November 19, 1903, Martinez was duly adjudged a prodigal and incompetent and Cohn was appointed his guardian. Thereafter, on February 3, 1904, in a suit between Martinez and one Sweeney, Judge of the Court of

First Instance of the city of Manila, the Supreme Court of the Philippine Islands made an order requiring the defendant judge to abstain from making an order or judgment of any kind whatsoever, authorizing the sale or other disposition of the property of Martinez, and prohibiting the officials of said court, including the guardian, from selling or otherwise disposing of such property, which order was in full force and effect (Rec., pp. 8-9).

For further separate and distinct answer and cross-complaint the defendants alleged as follows:

Martinez was adjudged a prodigal and incompetent and Cohn appointed his guardian as aforesaid, and further on December 18, 1903, the guardian was empowered to administer the properties of Martinez herein-after mentioned. The steamers "Don Francisco" and "Germana" were conjugal property of Martinez and his wife, the latter of whom died intestate July 31, 1896, leaving Martinez as her sole surviving relative and heir; and on May 2, 1903, Martinez was in possession of the steamers under an order of court of August 5, 1901, naming and appointing Martinez administrator of the steamers, together with other property constituting the conjugal estate of himself and his deceased wife (Rec., p. 9).

On May 2, 1903, Martinez, together with the plaintiff, made the instrument in writing aforesaid under and by virtue of the terms of which the parties thereto unlawfully and illegally stipulated and agreed that the steamers be pledged to the plaintiff as security for the payment of Thirty Thousand Dollars, Mexican currency; and by the said writing the parties unlawfully and illegally stipulated and agreed that the administration of the steamers should be conferred upon one Robles to hold the same at the disposal of the plaintiff and likewise unlawfully and illegally promised and agreed that

Martinez should abstain from administering the same (Rec., p. 10).

Thereafter, on June 15, 1903, a writing was executed between Martinez and the plaintiff, whereby it was agreed to cancel the alleged incumbrance attempted to be imposed upon the steamers as aforesaid; and, thereafter on June 30, 1903, Martinez made and signed with the plaintiff another writing purporting to transfer and assign to the plaintiff all right, title, and interest in and to the "Germana," subject only to the right of redemption in favor of Martinez (Rec., p. 10).

Martinez did not receive, nor did the plaintiff pay consideration of any kind for the alleged transfer of the steamer "Germana;" and the above-mentioned writings were made by Martinez and accepted by the plaintiff for the alleged purpose of securing unto the plaintiff the payment of an alleged personal debt of Martinez to the plaintiff. Martinez is not indebted to the plaintiff any sum or sums whatever; the alleged indebtedness of Martinez consisted of a fictitious account of moneys alleged to have been paid and expended by plaintiff for and on account of Martinez in the acquisition and satisfaction of certain alleged promissory notes; and said notes were null and void, as plaintiff knew, and the moneys paid in acquisition or satisfaction of the same or any of them, if any, were so paid without knowledge or consent of Martinez. During all the times mentioned Martinez had insufficient mental capacity to permit him to administer his business affairs or to comprehend the significance, object, or effect of the writings mentioned. By reason of said lack of mental capacity, Martinez was unduly susceptible to undue influence, artifice, and concealment of the agents and representatives of the plaintiff; and in making and signing the alleged contracts mentioned Martinez did not exercise a deliberate judgment, but was dominated and controlled therein.

the superior capacity and undue influence of the agents and representatives of the plaintiff (Rec., pp. 10-11).

On November 30, 1903, the plaintiff unlawfully and illegally availing itself of the alleged transfer and assignment of the "Germana," unlawfully and illegally claiming to be the owner of the same, took possession thereof and since continued in possession, appropriating to its own use and benefit the income and earnings produced by the said steamer (Rec., p. 11).

The defendants, therefore, prayed judgment that the plaintiff take nothing by its action; that the plaintiff had no right, title, or interest in and to the "Germana;" that the alleged transfer and incumbrances of said steamer in favor of plaintiff be cancelled and annulled; that plaintiff render a full, true, and correct account of all moneys had and received for and on account of the administration and operation of the steamer, and pay the same unto the defendants; and that plaintiff pay defendants the cost of suit incurred by the latter, and have general relief (Rec., pp. 11-12).

After the interposition and overruling of a demurrer to the cross-complaint, and exception to the action of the court in the premises (Rec., pp. 12-13), the plaintiff answered the cross-complaint, admitting the adjudication of Martinez as incompetent, the appointment of his guardian, and the allegations as to the steamers being conjugal property of Martinez and his wife, and the death of the latter, and denying all the other allegations of the cross-complaint, except the allegation that on June 30, 1903, Martinez and the plaintiff executed the writing of that date, which plaintiff admitted, asserting that said writing operated to transfer and assign the right, title and interest of Martinez in and to the "Germana;" and except the allegation that the plaintiff took possession of the steamer, which plaintiff admitted,

alleging such possession to have been lawfully acquired, and admitted that it had received certain moneys derived from the operation of the steamers, alleging that the expenses necessarily incurred in the operation thereof exhausted the income derived from the use thereof (Rec., pp. 14-15).

In No. 80 (No. 3472 in the court below), plaintiff filed its complaint against Martinez and his guardian, alleging as follows:

On June 15, 1903, and prior thereto, Martinez was indebted to the plaintiff in the sum of One Hundred and Ten Thousand Pesos, Mexican currency, then due and unpaid, as admitted by Martinez; in the further sum of Thirteen Thousand Dollars, United States currency, paid by plaintiff for Martinez, on June 2, 1903; and in the further sum of Nine Thousand Pesos, Mexican currency, loaned by the plaintiff to Martinez on November 29, 1902, all with interest at 8 per cent per annum, from and after the respective dates at which such indebtednesses accrued (Rec., pp. 47-8).

On June 15, 1903, Martinez, to secure the payment of said sums of money aggregating One Hundred and Fifty-nine Thousand, Six Hundred and Seven Dollars and Eighty-one Cents, Philippine currency, executed and delivered to the plaintiff his written obligation agreeing to convey to the plaintiff, with the right reserved of repurchase, certain tracts of real estate in the city of Manila, in all fourteen properties, of which the plaintiff was in possession of six and the defendant's guardian in possession of eight. The said obligation was, in fact, and in law, a mortgage given to secure the payment of the items of indebtedness aforesaid, and the plaintiff prayed judgment for the aggregate sum of One Hundred and Fifty-nine Thousand, Six Hundred and Seven Dollars, and Eighty-one Cents, Philippine currency, with interest

at the rate of 8 per cent per annum from the filing of the complaint, and for a sale of the real estate to pay the same (Rec., pp. 48-9).

After the interposition and overruling of a demurrer to the complaint (Rec., pp. 52-3), Martinez and his guardian answered the complaint, setting forth, as above, the adjudication of Martinez as a prodigal and incompetent, the appointment of a guardian for him, and the order in the action between Martinez and Judge Sweeney, as above described (Rec., pp. 54-5).

And for further separate and distinct answer and cross-complaint, the defendants alleged as follows:

Martinez was adjudged a prodigal and incompetent, and a guardian for him appointed as aforesaid. The real property designated in the complaint was conjugal property of Martinez and his wife, as aforesaid, and on February 2, 1903, Martinez was in possession of the property under an order of court as aforesaid (Rec., pp. 55-6).

On February 2, 1903, Martinez, together with the plaintiff, made the instrument in writing aforesaid, under and by virtue of the terms of which the parties thereto unlawfully and illegally stipulated and agreed that the property be hypothecated to the plaintiff as security for the payment of Eighty Thousand Dollars Mexican currency; and by the said writing the parties unlawfully and illegally stipulated and agreed that the administration of the property should be conferred upon the plaintiff, and that Martinez should abstain from administering the same. Thereafter, on June 15, 1903, a writing was executed between Martinez and the plaintiff, whereby it was agreed to cancel the alleged incumbrance attempted to be imposed upon the property as aforesaid, and it was unlawfully and illegally agreed to transfer absolutely to the plaintiff all right, title, and interest in and to the

said properties, subject only to the right of redemption in favor of Martinez (Rec., p. 56-7).

Thereafter, on June 30, 1903, Martinez, together with the plaintiff, made and signed a certain writing purporting to transfer and assign to plaintiff all right, title and interest in and to the property designated in the complaint. Martinez did not receive, nor did the plaintiff pay, any consideration for the alleged agreement of transfer, nor for the alleged transfer of the said properties; and the above-mentioned writings were made and signed by Martinez, and accepted by the plaintiff, for the alleged purpose of securing unto the plaintiff the payment of an alleged personal debt of Martinez to the plaintiff. Martinez is not indebted to the plaintiff in any sum or sums whatever; the alleged indebtedness of Martinez consisted of a fictitious amount of moneys alleged to have been paid and expended by plaintiff for and on account of Martinez in the acquisition and satisfaction of certain alleged promissory notes; and said notes were null and void, as plaintiff knew, and the moneys paid in acquisition or satisfaction of the same, or any of them, were so paid without the knowledge or consent of Martinez (Rec., p. 57).

During all the times mentioned Martinez had insufficient mental capacity to permit him to administer his business affairs or to comprehend the significance, object or effect of the writings mentioned. By reason of the said lack of capacity, Martinez was unduly susceptible to undue influence, artifice, and circumvention of the agents and representatives of the plaintiff, and in making and signing the alleged contracts mentioned, Martinez did not exercise a deliberate judgment, but was dominated and controlled therein by the superior capacity and undue influence of the agents and representatives of the plaintiff (Rec., pp. 57-8).

On November 30, 1903, the plaintiff unlawfully and

illegally availing itself of the alleged transfer and assignment of the property mentioned in the complaint, and lawfully (*sic*) claiming to be the owner thereof, took possession thereof and has since continued in such possession, appropriating to its own use and benefit the income and earnings produced by the property (Rec., p. 58).

The defendants, therefore, prayed judgment as in their cross-complaint in No. 79 (No. 3471).

After the interposition and overruling of a demurrer to the cross-complaint, and exception to the action of the court in the premises (Rec., pp. 58-60), the plaintiff filed to the cross-complaint an answer, *mutatis mutandis*, similar to its answer to the cross-complaint in No. 79 (Rec., pp. 60-2).

In No. 79 the complaint was filed February 25, 1905 (Rec., p. 3); the answer and cross-complaint May 24, 1905 (Rec., p. 12); and the answer to the cross-complaint August 26, 1905 (Rec., p. 15).

In No. 80 the complaint was filed February 25, 1905 (Rec., p. 49); the answer and cross-complaint at a date not appearing, but prior to the demurrer of June 14, 1905 (Rec., p. 59); and the answer to the cross-complaint September 4, 1905 (Rec., p. 62).

In No. 80, on February 27, 1906 (Rec., pp. 62-3), the defendant guardian below moved for leave to amend the answer and counterclaim by substituting an amended answer and cross-complaint, upon the grounds that in the preparation of the defense the said defendant had discovered new evidence materially changing the nature of the defense to be made to plaintiff's complaint; that such amendment was necessary to correct mistaken and inadequate allegations in the former answer and cross-complaint; and that said amendment was necessary in order that the actual merits of the controversy might

be speedily determined. No action appears to have been had upon this motion, though there is in the record (Rec., pp. 63-70) a paper entitled "Amended Answer and Cross-Complaint," dated February 27, 1906, and purporting to have been filed February 28, 1908 (presumably a misprint for 1906, Rec., p. 70); and also another paper entitled "Second Amended Answer and Cross-Complaint" (Rec., pp. 70-78), purporting to have been filed March 15, 1906 (Rec., p. 78). No answer by the plaintiff to either of these two last-mentioned papers appears in the record.

The purport of these two papers, namely, "Amended Answer and Cross-Complaint" and "Second Amended Answer and Cross-Complaint," in addition to the allegations respecting the incapacity of Martinez, is that he was the victim of a conspiracy among one Brown, agent, manager and representative of the plaintiff, one Regidor and one Azaola, agents and attorneys of Brown, acting as such agent and manager, having for its object the cheating and defrauding of Martinez of his property; that, in pursuance of such conspiracy, Brown, Regidor, Azaola, and their agents and employees entered into an agreement and combination with certain gamblers and other persons of the city of Manila, whereby the latter were to engage Martinez in games of chance prohibited by law, and to secure from him promissory notes and other obligations for the sums lost by him in such games, and to secure from the holders thereof other worthless and void promissory notes and obligations of Martinez for gambling debts previous to said conspiracy, the said promissory notes and obligations to be acquired by Brown and his co-conspirators for an insignificant portion of their face value and to be charged against Martinez at their full face value in his accounts with the plaintiff; that, in conformity with such agreement and

combination, said gamblers lured Martinez into playing such games of chance, and did thereby cheat and swindle him out of large sums of money, and secured from him in payment of said sums promissory notes and obligations aggregating, together with the notes and obligations previously executed by him for gambling debts, more than Two Hundred Thousand Pesos, a large portion of which said notes and obligations were acquired by Brown for the plaintiff for an insignificant portion of their face value, and were by him charged upon the books of the plaintiff to the account of Martinez at their full face value; that, pursuant to said conspiracy, Brown opened an account current with the bank of the plaintiff in favor of Martinez in an ostensible amount of Thirty Thousand Pesos, subsequently and for the same ulterior motive increased to Eighty Thousand Pesos, against which account Martinez drew various checks in favor of various persons in payment of gambling debts and other alleged obligations; that when such checks were presented to plaintiff's bank payment was refused, and the holders thereof required by Brown to consult with and secure the approval of Regidor, whereupon such checks were paid by the plaintiff upon condition that the holders pay a discount of from twenty-five to fifty per cent of the face value of such checks, which checks were then charged to the account current of Martinez at their full face value for the purpose of consuming his ostensible credit of Eighty Thousand Pesos; that, pursuant to said conspiracy, Brown and Regidor, taking advantage of the ignorance and mental incapacity of Martinez, and the undue influence which they exercised over him by deceit, misrepresentation, etc., induced and forced Martinez to sign and deliver to them various checks aggregating a large sum in payment for certain of the gambling obligations acquired by them, which checks so signed and delivered

were charged against the account of Martinez in plaintiff's bank, to consume said ostensible credit of Eighty Thousand Pesos; that, on January 23, 1903, Martinez signed and delivered to plaintiff, for the purpose of opening the account current aforesaid, his promissory note for Thirty Thousand Pesos; that thereafter, on February 2, 1903, Martinez, without consideration, was by fraud, etc., induced and forced by Brown, Regidor and Azaola to sign and deliver to the plaintiff another promissory note for Thirty Thousand Pesos, said named persons falsely representing to Martinez that the new note was for the purpose of cancelling the note of January 23, 1903; that, notwithstanding the giving of said second note for Thirty Thousand Pesos, the plaintiff fraudulently retained the earlier note uncanceled, with the intention of collecting the full face value of both notes; that thereafter on February 2, 1903, Brown, Regidor and Azaola, by the same undue influence, induced and forced Martinez to sign and deliver another promissory note for Eighty Thousand Pesos, for the purpose of increasing his credit in account current, including said original so-called credit of Thirty Thousand Pesos to the sum of Eighty Thousand Pesos, without giving Martinez credit for the two notes for Thirty Thousand Pesos aforesaid; that afterwards, on May 3, 1903, by the same fraudulent means, Martinez was induced and forced by Brown, Regidor and Azaola to sign the instrument of sale, with right of repurchase, of the steamers "Don Francisco" and "Germana" to secure the fictitious obligation created by said promissory note for Thirty Thousand Pesos, of February 2, 1903, which instrument forms the basis of plaintiff's claim against Martinez in No. 79; that thereafter, on June 15, 1903, by the illegal and unlawful means aforesaid, Martinez was by Brown, Regidor and Azaola induced and forced to sign the instrument of that date

hereinbefore mentioned; that the obligation of One Hundred and Ten Thousand Pesos mentioned in said last-mentioned instrument is made up of the notes for Thirty Thousand Pesos and Eighty Thousand Pesos dated February 2, 1903; that the separate loan of Thirty Thousand Pesos mentioned in the instrument of June 23, 1903, is the same fictitious obligation represented by the promissory note of February 2, 1903, and said instrument of May 2, 1903; that after triplicating said fictitious obligation of Thirty Thousand Pesos, the plaintiff still retained said three promissory notes of January 23, 1903, and February 2, 1903, uncanceled, until about the month of February, 1904, when the same were turned over and delivered by Brown to Regidor for safekeeping, pending certain investigations into the frauds perpetrated by the conspirators then being conducted by the prosecuting attorney of the city of Manila, it being the intention of the conspirators fraudulently to collect from Martinez the fictitious obligation represented by the said three promissory notes, and the same fictitious obligations represented by the instruments of May 2, and June 15, 1903; that, on February 13, 1903, Martinez signed and delivered to Brown, Regidor and Azaola his check for Nine Thousand Pesos, drawn on his current account with plaintiff's bank in favor of one Legaspi, for the purpose of paying an obligation of that amount due said Legaspi; that said check was charged against said account in plaintiff's bank, and was used to consume said ostensible credit of Eighty Thousand Pesos hereinbefore mentioned; that, notwithstanding such payment and charge, Brown, Regidor and Azaola, by the illegal means heretofore shown, included as a separate item of alleged indebtedness set forth in the instrument of June 15, 1903, "the payment of said attempting to force the said Martinez to pay said obligation twice;" that, on June 21, 1903, by the same illegal means, Martinez was induced and

forced by Brown, Regidor and their employees to sign and deliver to them a check on his current account for the sum of Thirty Thousand Pesos, without any consideration whatever, which check was charged against his current account with the fraudulent intent of fictitiously increasing his alleged indebtedness therein, the excess of which over said ostensible credit of Eighty Thousand Pesos was to be included in the subsequent instrument executed February 12, 1904; that, pursuant to the conspiracy aforesaid, Brown, Regidor, Azaola and their employees and agents obtained complete ascendancy over the mind of Martinez to such an extent as to deprive him of all power of independent action; that, pursuant to said conspiracy, the said named conspirators induced and forced Martinez to sign, among other documents, the instrument of June 15, 1903, the signing of which was without consideration or benefit to Martinez, the alleged indebtedness recited therein as due from Martinez to plaintiff being wholly fraudulent and fictitious; that on February 12, 1904, and subsequent to the adjudication of Martinez as a prodigal and incompetent person, the said conspirators induced and forced Martinez to sign the instrument of that date, purporting to comply with the conditions to be performed on the part of Martinez under the instrument of June 15, 1903; that, after the signing of said instrument of February 12, 1904, the said conspirators fraudulently attempted to falsify the same by antedating it to a time previous to the judicial determination of the prodigality and incompetency of Martinez; that if during the transactions related there were any sums of money actually delivered to Martinez or paid out for his benefit by the conspirators, such sums were so delivered and paid by them for the sole object of retaining and strengthening their influence and ascendancy over Martinez, and to enable them to accomplish their criminal conspiracy to

defraud him of his property; that, notwithstanding the fraud, etc., exercised by Brown and his co-conspirators in securing the instrument of June 15, 1903, the defendants never refused to comply with the provisions of said instrument requiring the transfer to plaintiff of sufficient of the properties therein described which, at the prices therein specified, would extinguish any legal indebtedness which might be found to exist against Martinez in favor of the plaintiff, etc.; that, by reason of the signing and delivery of the said instrument of June 15, 1903, and of other facts pleaded, all the instruments previously signed and delivered to plaintiff, attempting to incumber and transfer the property of Martinez, were cancelled and became of no effect, as did also the instrument of February 12, 1904; and that, on or about November 24, 1903, and subsequent to the judicial determination of the incompetency of Martinez, the plaintiff wrongfully took possession of a large portion of the properties of Martinez, and administered the same and failed to account to the defendants therefor: wherefore, the defendants prayed judgment accordingly, and that the plaintiff render an account of all moneys had and received by it for and on account of the administration of the real property and vessel aforesaid, and pay the same to the defendants (Rec., pp. 63-84).

As already stated, leave of court does not appear to have been given to file either the "Amended Answer and Cross-Complaint" or "Second Amended Answer and Cross-Complaint," and the plaintiff does not appear to have answered either.

And it would have been extraordinary had the court given leave to file either of the papers mentioned, in view of the situation existing at the time of their presentation. The last session at which testimony was

taken for the defendants was held March 13, 1906 (Rec., p. 278), and testimony in rebuttal for the plaintiff was taken March 14, 1906 (Rec., p. 298). Of the three alleged conspirators, Regidor died about the middle of the year 1905, and Azaola one year earlier (Rec., p. 168), and Brown had left Manila sometime in the year 1905 (Rec., p. 157); besides which Lontoc, the writer of the defendant's important Exhibit No. 42 (Rec., p. 381), was also dead (Rec., p. 237); so that it would have been grossly unfair to the plaintiff to have allowed the pleadings to be re-cast "in order to conform to the proofs adduced," and to seek to charge the plaintiff with liability on account of an alleged conspiracy, all the participants in which, and a most important witness respecting which, were proved to be either dead or absent.

In No. 79, and on March 15, 1906 (Rec., p. 15), Martinez and his guardian (one Ilustre, substituted for Cohn), as defendants, by alleged "leave of the court first had and obtained," which nowhere appears in the record, filed, "in order to conform to the proofs adduced," an amended answer and cross-complaint, denying every allegation in plaintiff's complaint, not specifically admitted, and making various allegations, of which the material are as follows:

On or about January 1, 1903, Brown, agent, manager and representative of the plaintiff, Regidor and Azaola, agents and attorneys of the plaintiff employed by Brown, with full knowledge of the mental incapacity and incompetency of Martinez, entered into a conspiracy for the purpose of defrauding him of his property. On May 2, 1903, Martinez signed and delivered to the plaintiff the agreement aforesaid of that date, but was incapacitated and wholly incompetent to administer his affairs or to comprehend the significance, object and effect of said instrument, wherefore it was not binding upon him or

his estate. On February 2, 1903, Martinez, without any consideration, was by fraud and on account of his mental incapacity induced and forced by Brown, Regidor and Azaola, their agents and employees, to give the plaintiff a promissory note for Thirty Thousand Pesos, the same persons falsely representing to Martinez that the note was for the purpose of cancelling another of January 23, 1903, for the same amount, given by Martinez to the plaintiff for the purpose of opening an account current in its bank, and notwithstanding the giving of the second note, the plaintiff fraudulently retained the earlier one uncanceled with the intention of collecting both. Thereafter, on February 2, 1903, Brown, Regidor and Azaola, by fraudulent means, induced and forced Martinez to deliver another promissory note for Eighty Thousand Pesos, for the purpose of increasing his credit to that amount, without giving Martinez credit for either of the two notes for Thirty Thousand Pesos aforesaid. Afterwards, on May 2, 1903, by the same fraudulent means, Martinez was induced and forced to sign the instrument of that date, which is the basis of plaintiff's complaint, to secure the fictitious obligation created by the promissory note of February 2, 1903.

Thereafter, on June 15, 1903, by the illegal and fraudulent means aforesaid, Martinez was by the conspirators induced and forced to sign the instrument of that date, forming the basis of plaintiff's claim in No. 80, the alleged obligation of One Hundred and Ten Thousand Pesos mentioned in which is made up of the notes of Thirty Thousand Pesos and Eighty Thousand Pesos, dated February 2, 1903. The separate loan of Thirty Thousand Pesos mentioned in that instrument is the same fictitious obligation represented by the promissory note of February 2, 1903, and by the instrument of May 2, 1903, the basis of complaint in No. 79. After triplicating said fictitious obligation of Thirty Thousand Pesos aforesaid,

the plaintiff continued to retain the three promissory notes of January 3, 1903, and February 2, 1903, uncanceled, until about the month of February, 1904, when the same were turned over and delivered by Brown to his co-conspirators for safekeeping, pending the investigation aforesaid, it being the intention of the conspirators fraudulently to collect from Martinez the fictitious obligation represented by the three promissory notes, and again to collect the same fictitious obligation represented by the instruments of May 2 and June 15, 1903. After the declaration of prodigality and incompetency of Martinez, Brown and Regidor, in pursuance of the said conspiracy, and for the purpose of simulating a consideration for the execution of the instrument of May 2, 1903, and to avoid detection of the fraud perpetrated thereby, attempted to falsify the books of plaintiff, by causing to appear therein that the consideration of said instrument was made up of various promissory notes given by Martinez in favor of certain fictitious obligations contracted by Martinez in games of chance prohibited by law, in which Martinez was cheated and swindled by certain gamblers in whose favor said notes were executed, and which promissory notes were in pursuance of said conspiracy to cheat and defraud Martinez, acquired by the conspirators at an insignificant portion of their face value, with full knowledge of the circumstances under which they were given, and charged up against Martinez in their full face value in his account with the plaintiff. For the purpose of more clearly showing the conspiracy and the fraud practised by the conspirators, defendants refer to, adopt, and make a part of their answer herein all of the allegations set forth in their answer and cross-complaint in No. 80. By reason of the facts hereinabove set forth, the pretended obligation upon which this suit is based is included in and cancelled by the instrument of June 15, 1903.

the basis of complaint in No. 80, in which the claim for said alleged obligation is merged, or in other words, there is another action pending for the same cause. On or about November 4, 1903, and subsequent to the judicial determination of the incompetency of Martinez, the plaintiff wrongfully took possession of the steamer "Germana," and has used and administered the same, by reason of which the plaintiff is indebted to the defendant guardian in a large amount, the exact sum of which can only be determined by an accounting. Wherefore, the defendants pray that the transfer and incumbrance of the said vessel be cancelled; that the said vessel be delivered to defendants; and that the plaintiff render an account of all moneys received by it for and on account of the administration of the vessel, and pay the same to the defendants.

As above stated, no leave of court to file this Amended Answer and Cross-Complaint appears in the record, and the plaintiff does not appear to have answered the same.

In its opinion and decision the Supreme Court, in the latter case, No. 80, held that the plaintiff was entitled to a judgment in the court below declaring that Martinez was justly indebted to it in the sum of One Hundred and Fifty-nine Thousand Six Hundred and Seven and Eighty-one One-hundredths Pesos, *less such sum as the latter court might decide* should be credited to Martinez for the net receipts from the real estate in the cause mentioned, with interest on the balance from February 25, 1905, at 8 per cent per annum, and ordering that Martinez and Ilustre, his guardian, should execute and deliver to the plaintiff such a contract as was contemplated by that of June 15, 1903, to be substantially in the form of the instrument of February 12, 1904, omitting therefrom, however, the steamer "Germana;"

the judgment to contain a provision that *whatever might be realized from the sale of the "Germana" under the judgment in No. 79, should be considered as a partial payment when realized upon the amount due in No. 80* (Rec., p. 99, fol. 92).

The Court of First Instance, on March 29, 1906 (Rec., pp. 19-20), rendered a judgment dismissing the plaintiff's suit in No. 79, and directing the plaintiff to deliver possession of the steamer "Germana" to Ilustre, guardian of Martinez, on demand; and on the same day (Rec., pp. 85-88) delivered a judgment dismissing the plaintiff's suit in No. 80, and decreeing that Ilustre, guardian of Martinez, recover of the plaintiff Twenty-nine Thousand Two Hundred and Eighty-one and Ninety-two Hundredths Pesos, Philippine currency, and deliver to Ilustre, guardian, the six pieces of real estate aforesaid, mentioned and described in the pleadings as in the possession of the plaintiff.

The Supreme Court of the Philippine Islands, on March 24, 1908, reversed the judgment in No. 79, with directions to the lower court to enter judgment in favor of the plaintiff for the sum of Twenty-eight Thousand Five Hundred and Ninety-nine and Thirteen Hundredths Pesos, and interest at the rate of 8 per cent per annum, from January 1, 1904, with costs, and for the sale of the steamer "Germana," to satisfy the said judgment if not paid (Rec., p. 36). The opinion of the Supreme Court in this case is on pages 26 to 32 of the record, and the judgment of that court was rendered after denial of a motion for a re-hearing (Rec., pp. 33-36).

On the same day, namely, March 24, 1906, the Supreme Court reversed the judgment in No. 80, with directions to the lower court to enter judgment in favor of the plaintiff in accordance with the decision of the Supreme

Court (Rec., p. 103). The opinion of the Supreme Court in this case is on pages 96 to 99 of the record, and the judgment of that court was rendered after denial of a motion for a re-hearing (Rec., pp. 100-3).

After the judgment of the Supreme Court of the Philippine Islands, no further proceedings appear to have been had in the Court of First Instance, and the supposed appeal in each case is to this court from the judgment of the Supreme Court of the Philippine Islands (Rec., pp. 37-39, 43-44; Rec., pp. 104-6, 110).

II.

Argument.

1. This court is without jurisdiction in the premises.

The question of this court's jurisdiction to entertain the appeals obviously presents itself in the outset, as is recognized in the brief of counsel for the appellant (pages 18-20); and it is sought to sustain the jurisdiction of the court by appeal to the principle that if the amount of a judgment and of a counter-claim which has been dismissed, when added together, make up the requisite amount, this court has jurisdiction.

The manifest difficulty with this contention is that nowhere in the pleadings is any amount set up by way of counter-claim, such counter-claim as there is being asserted in the most general terms possible. Counsel for the appellant evidently recognizes this and seeks to find the amount of the counter-claim in the testimony, which, of course, will not do. If, for argument's sake, it be conceded that, as contended, the amount of a judgment may be added to the amount of a dismissed counter-claim to make up the necessary jurisdictional amount, resort can not be had to the testimony to find the amount of the counter-claim; that must appear in the

pleadings. Wherefore, if the jurisdiction of this court depends upon the principle invoked, the appeals must be dismissed. This is quite too clear for discussion.

Nor is the situation for the appellant aided by the further contention of counsel that although there was no technical consolidation of the two cases, they constitute in effect but one litigation. On the contrary, this very contention is destructive of the jurisdiction.

As the record clearly shows, there are before the court two separate and distinct cases, separately instituted below, resulting in separate judgments in both the Court of First Instance and the Supreme Court of the Philippines, and brought here by two separate and distinct appeals, each separately allowed and each separately undertaken to be superseded.

But assuming that the two cases do constitute in effect but one litigation, the situation is this: In No. 79, the judgment is for Twenty-eight Thousand Five Hundred and Ninety-nine and Thirteen One-hundredths Pesos, with interest at 8 per cent per annum, from January 1, 1904, and that the steamer "Germana" be sold, if necessary, to pay and satisfy the same (Rec., p. 36). In No. 80, the judgment is that the judgment of the Court of First Instance be reversed and the cause remanded, with directions to the judge to enter judgment in favor of the plaintiff, in accordance with the decision of the higher court (Rec., p. 103); and, as above pointed out, the decision of the latter court is that Martinez was indebted to the plaintiff in the sum of One Hundred and Fifty-nine Thousand Six Hundred and Seven and Eighty-one One-hundredths Pesos less a sum to be decided by the court below as a credit, and less also whatever might be realized from the sale of the "Germana" under the judgment in No. 79 (Rec., p. 99, fol. 92).

Very clearly this is not a final decree, and, therefore, is not appealable. Before the amount payable to the

plaintiff according to the judgment of the Supreme Court of the Philippines can be ascertained and stated, it will be necessary, first, that the "Germana" be sold, and the amount realized from it thereby ascertained; and, secondly, that the Court of First Instance shall ascertain and declare the credit to be allowed Martinez for the net receipts from the real estate in question in No. 80; the proceeds of the "Germana" and the amount to be credited to Martinez being ascertained, and their aggregate deducted from the amount awarded the plaintiff, the amount actually recoverable by the plaintiff, would be the difference, and, too clearly for argument, until such difference be ascertained, this court is without knowledge of the amount actually in controversy between the parties.

It follows, beyond all room for discussion, that the appeals must be dismissed.

2. Assuming the court to have jurisdiction in the premises, the judgments below should be affirmed.

For convenience of treatment the order of the brief for the appellant will be followed.

Counsel for the appellant contend as follows:

(1) The judgments of the court below were contrary to the preponderance of the evidence.

(2) The plaintiff is affected by the alleged frauds of its manager and his knowledge in the premises.

(3) The nominal consideration for the instrument sued on is to a great extent illicit and fictitious.

(4) The contract sued on in No. 79 is not an existing obligation.

(5) The judgment in No. 80 is not within the issues or justified by the facts pleaded or proved; and

(6) The plaintiff violated orders of court and is entitled to no consideration.

(1) Under the first contention it is asserted that:

(a) At the time of the transactions involved, Martinez was incompetent to make a binding contract;

(b) The instruments sued on were induced by fraud, threats or undue influence.

(a) It is difficult seriously to consider the contention as to the incompetency of Martinez to transact business.

No reliance seems to be placed by counsel upon the adjudication of prodigality, and for good reason. The Civil Code in force in the Philippines (Articles 221 to 227), dealing with prodigals, clearly recognizes that class of unfortunates as being very different from the class of incompetents, in the sense of those who are lacking in mental capacity. By article 224 it is provided that "the declaration of prodigality does not deprive the prodigal of the maternal and paternal authority," a provision wholly inconsistent with the idea that prodigals and incompetents are to be treated as in the same class. And article 1263, enumerating persons who "can not give consent," does not mention prodigals.

And another good reason for not relying upon the adjudication of prodigality is that article 226 provides that "the acts of a prodigal, prior to the request for interdiction, can not be contested on account of prodigality."

Judiciously, therefore, it is sought to make out a case of mental incompetency on the part of Martinez, wholly independent of the adjudication of prodigality.

But the most casual reading of the testimony, and the briefest consideration of it, will show the futility of this effort. The statement of the Court of First Instance that Martinez was "imbecile," "demented," or "not mentally capable of transacting business" is refuted by the testimony at every point, and can not be characterized otherwise than as extravagant and unwarranted.

It would serve no good purpose, and is wholly unnecessary, to review at any length the voluminous, disjointed and for much the greater part wholly incompetent and irrelevant testimony with which the record is burdened, with a view to dealing with the scattered and trivial statements of witnesses having any, the slightest, bearing upon this question of incompetency; it will suffice to say that a careful reading of the opinion of the Supreme Court, by Willard, J. (Rec., pp. 27-8, *fols.* 46-48), will convince anyone who has the patience to go through the record that what is there said by the court is abundantly and literally justified, and expresses the only possible intelligent judgment upon the point under consideration.

(b) Nor is there any greater force in the contention that the instruments sued on were induced by fraud, threats, or undue influence.

In the opinion already cited (Rec., p. 28, *fol.* 49) it is significantly pointed out that this matter was not mentioned in the brief for the appellee below (appellant here), and the court pointedly and justly said that "this defense finds no support in the evidence." Again it is unnecessary to review the testimony at length; the most that it could be claimed to show in any view possible to be taken of it, even from the appellant's viewpoint, is not that Martinez was defrauded or unduly influenced in executing the instruments sued on, but that his frailty in respect of gambling made him a prey to sharpers, one of whom may or may not have been the plaintiff's employee Brown, and that these sharpers swindled him in respect of checks which he gave in payment of his gambling debts. Again the opinion of the Supreme Court effectively deals with this contention, and announces the only conclusion to be drawn from a fair, not to say intelligent consideration of the testimony.

The citations from the record set forth in the brief for the appellant tend to show this and this only; and surely it is not to be argued that negotiations and communications between those engaged in fleecing Martinez in respect of the cashing of his checks, can have any bearing upon the question of the validity of the instruments sued on, seeing that it is pretended by no one that any part of the moneys subtracted by anybody from the proceeds of the checks found its way to the plaintiff, or entered into the consideration upon which the instrument sued on rested. This makes wholly unimportant and puts altogether out of consideration the question whether the bank's agent ever received any money by reason of any of the transactions between the alleged principal conspirator Regidor and Martinez, although the Supreme Court below distinctly found (Rec., pp. 30-31), that none of the evidence indicated in the slightest manner that the plaintiff's agent ever received any money by reason of any of the said transactions.

(2) The contention that the plaintiff is affected by the alleged fraud of its manager and his knowledge in the premises, depends, in its last analysis, upon the proposition that as it was only through the manager's official position and power that the frauds practiced on Martinez were possible, the plaintiff is, therefore, chargeable therewith.

But the only alleged frauds upon the possible participation in which of the plaintiff's manager any of the testimony even remotely bears, are the alleged frauds in "shaving" the checks of Martinez, given for his gambling debts; and the statement in the Brief for the Appellant (page 36), that, as agent of the plaintiff, its manager intimidated Martinez into executing the various obligations to the plaintiff, is without support in the record.

Although on the examination of various witnesses for the plaintiff, when alleged statements of Martinez made after the adjudication of his prodigality were about to be given, the court refused to hear them upon the ground that, so long as the adjudication remained unvacated, the prodigality and the assumed incompetency incident thereto continued (e. g., Rec., pp. 192-3, 207-8), Martinez was called as a witness for the defense; and when under examination said, in answer to the pointed question who it was that threatened him when he refused to sign various documents, "Mr. Regidor and Mr. Brown" (Rec., pp. 82-3). But there is no hint in his testimony as to what those documents were; he admitted that at the time he signed the documents of which he was speaking they were read to him, and their contents explained (Rec., p. 283, fol. 292); that he never spoke to anybody but his now dead wife about the alleged threats (Rec., pp. 287-8); and that when he was under examination before the court in the matter of his prodigality, he said nothing about the alleged threats (Rec., p. 288). And throughout his testimony in that proceeding, which is incorporated in the record (pages 315 et seq.), he repeatedly speaks of his indebtedness to the plaintiff and his desire to have it paid.

The subordinate contention that the plaintiff's manager had actual knowledge of the mental incapacity of Martinez and of the frauds and machinations practised upon him may be dismissed with a remark: there was no mental incapacity of which the manager could have knowledge; and, as already stated, the alleged frauds and machinations were in respect of matter wholly outside of the instruments sued on.

(3) The unsubstantial character of the contention that the nominal consideration for the instruments sued on is to a great extent illicit and fictitious is recognized by

the statement of counsel for the appellant (Brief, page 39), "that it is difficult at the present time to unravel the tangle and ascertain which of the notes involved are separate and original frauds and which are duplicates and repetitions."

It would serve no useful purpose to undertake to accompany counsel in the effort to find these alleged duplications and repetitions in the record: it may suffice to say that the plaintiff's employees who testified, and the plaintiff's records given in evidence, establish beyond room for doubt that, so far as the plaintiff is concerned, the indebtednesses for which it sued were genuine and legitimate, no matter through what experiences Martinez may have gone in bringing himself to the incurring of those indebtednesses.

(4) The suggestion that the contract sued on in No. 79 is not an existing obligation, because it was extinguished by the instrument of June 15, 1903, grows out of a misapprehension of the meaning of the portion of that instrument referred to (Rec., p. 425), the most casual reading of which will show that it was the steamer "Don Francisco," and not the steamer "Germana," to which the supposed "extinction" relates.

(5) Similarly, the contention that the judgment in No. 80 is not within the issues, or justified by the facts pleaded or proved, rests upon a patent misapprehension.

That the instrument of June 15, 1903, mentioned in the complaint in that cause, is alleged in the complaint to be in fact and in law a mortgage, coupled with the further allegation that none of the conditions of the said instrument had been fulfilled by Martinez, and followed by the prayer that in case of the failure of Martinez to pay the plaintiff the sum named in the cause, the real estate therein described might be sold to pay the amount due the plaintiff, amounts to nothing more than an allegation that Martinez had agreed to convey the real estate

as security for his indebtedness, under conditions equivalent to those of a mortgage, and that, he not having done so, his agreement so to convey should be treated as in effect the contemplated mortgage and dealt with accordingly.

The Supreme Court below, however, as it properly might do under the prayer for general relief, decreed compliance with the instrument of June 15, 1903. And its direction for the omission of the steamer "Germana" from the judgment which it directed the Court of First Instance to render, is explicable by the simple fact that the court had already dealt with that property by its judgment in No. 79.

(6) The suggestion that the plaintiff violated certain orders of the court, and is, therefore, entitled to no consideration, has reference to the plaintiff's taking possession of certain property of Martinez three weeks after the decree of November 19, 1903 (Rec., pp. 373-375), by which it is said in the Brief for the Appellant (pp. 48-9), "all persons were forbidden . . . from interfering in any way with Martinez's property."

As by reference to that decree clearly appears (Rec., p. 375, *fol.* 68), it prohibited all agents and representatives of Martinez, except his guardian, "from in any manner interfering in the administration, management or control" of his estate, a wholly different thing from prohibiting a potential lienor from making his lien actual.

But even if it were true that the plaintiff, whether mistakenly or obstinately, disregarded that decree or any provision thereof, that is no reason for fining the plaintiff the amount of its justly adjudicated claim in the premises.

Respectfully submitted.

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For the Appellee.